Office-Supreme Court, U.S.
FILED
JUL 13 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962

No. 151 -

BANKERS TRUST COMPANY and LEONARD M. WALLSTEIN, as Executors of the Will of CHARLES NEWMAN, Deceased,
Petitioners,

—vs.—

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONERS

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1. Defendant seeks to sustain the decision below upon the ground, stated in the opinion below, that a remote possibility of issue is not shown by a 46/100,000 or lesser chance of issue "without more" (26a, 46a)—i.e. physical incapacity. This insistence upon physical incapacity is apparently predicated upon the assumption that Mrs. Hughes' volition to have a child might nullify the demonstration of statistics. There is no justification in authority or principle for such insistence.

In *Commissioner* v. *Sternberger*, 348 U. S. 187 (1955), because the 27 year old woman there concerned was concededly capable of having a child, her possible volition so to do was clearly capable of fulfillment. In *U. S.* v. *Dean*, 224

F. 2d 26 (1st Cir. 1955) the court, in referring to the point of volition in *Sternberger*, expressly emphasized that the life tenant there was "a 27 year old woman" (at p. 28). So far as concerns the matter of volition here, the record shows and defendant concedes (Brief, p. 6) that up to the time of testator's death, including the period during which she might have borne a child, Mrs. Hughes did not wish to have one. After his death, when she was 47, even if her wish changed, the chance of fulfilling it would be 46/1000th of 1% or less and any attempt so to do would be suicidal (10a), a factor which, as defendant indicates (Brief, p. 6) the court will decline to consider in assessing the measure of improbability or the reverse.

2. The opinion below concedes that "it is reasonable to conclude . . . that at age 47, the chance that a woman will bear issue for the first time, thereby defeating the remainder interest which would otherwise go to charity, is *limited*" (25a, emphasis supplied). A forty-six thousandths of one percent chance is, indeed, limited. Clearly, however, the courts below did not consider that negligible chance sufficient because it did not amount to positive, absolute *certainty* or, as the opinion put it, the taking by charity was not "sufficiently certain" (20a). What but an insistence upon certainty, as opposed to all but a negligible chance of failure, could explain the requirement below that in addition to the negligible chance of issue, there must be proof of the *impossibility* thereof "due to poor health or incapacity due to surgery or natural causes" (25a) for otherwise, said the opinion, there was "a physical possibility that the charity remainder might be defeated" (21a). Therefore, again, "it was reasonable to require plaintiff to come forward with some evidence bearing on

this particular case tending to show either the life tenant's poor health or her incapacity to bear issue due to surgery or other causes" (46a). Finally, the lower courts' position was summarized in the statement that "the principle of general application [is] that deduction is appropriate where the charity is 'sure to take' but not when 'the condition is such that charity may not take at all'" (23a).

Clearly defendant's brief is wrong when it states that "the district court explicitly rejected any requirement of absolute certainty" (p. 6) The quotation there given from the opinion was but a paraphrase of § 81.46, which the opinion thereafter studiously proceeded to negate. What can "physical incapacity" or "sure to take" mean except *certainty?*

The courts below exacted *certainty* and that exaction was due to the misreading of a passage in the opinion in *Sternberger* taken out of context, just as the Government was shown to have done by the First Circuit Court of Appeals in *Dean.* We submit that if the lower courts here were right, § 81.46 is a dead letter and so is the Treasury Department's own construction of it in Rev. Rul. 59-143.

3. That *Dean* involved the question of longevity does not affect the fact that it conflicts with the decision here below. Both *Dean* and the instant case turned on the common questions (1) of the correct construction of § 81.46, (2) of the meaning and effect of the passage in the *Sternberger* opinion upon which the result below was based and (3) of the controlling effect of statistics in determining the extent of the chance that charity would not take. Upon all those fundamental points the cases are in direct conflict.

If the decision here was correct no contingent bequest to charity is deductible unless, despite § 81.46, the contingency

is purely verbal and the taking by charity is as certain as if there were no mention of contingency. If *Dean* is correct the deduction is permissible under § 81.46 if experience, embodied in government statistics, shows the charity will take except for a negligible chance to the contrary.

4. Defendant's brief (footnote, p. 7) is incomplete and, therefore, wrong in asserting that the New York law holds that the term "issue" includes a child adopted after the testator's death. The very recent decision of the New York Court of Appeals in *Rick's Trust*, 12 App. Div. 2d 395 (March 16, 1961); affd 10 N. Y. 2d 231 (July 7, 1961) clearly reiterates the rule of New York that a child, adopted after the testator's death, is not included in the term "issue" unless there is independent affirmative evidence that the testator so intended. There is here not the slightest such evidence.

CONCLUSION

We submit, therefore, that for the reasons stated in our petition and this reply brief the petition should be granted.

Respectfully submited,

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